STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT II

Case No. 2022AP000161-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAMIAN L. HAUSCHULTZ,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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INTRODUCTION

Timothy Hauschultz disciplined his children by forcing them to carry logs around their yard for hours at a time, no matter the weather. He called this punishment "carrying wood." In April 2018, Tim ordered Damian Hauschultz and two of Damian's foster siblings to carry wood. But since Tim would be gone for the day, he couldn't supervise. He delegated that task to Damian, who at 14 was the oldest child in the home.

Damian and his siblings picked up the logs Tim had selected for them and began trekking around their snowy yard. One of Damian's siblings, Ethan, started to struggle. Under orders to enforce Ethan's punishment, Damian resorted to increasingly extreme measures to keep him moving. They did not work. Ethan became unresponsive and died of hypothermia later that night.

Damian was interrogated three times—always alone, never with *Miranda*[1] warnings—while Ethan received medical treatment and shortly after he died. Damian moved to suppress the statements he made during these interrogations, arguing that he was entitled to *Miranda* warnings and that his statements were involuntary. The circuit court denied his motion, and the court of appeals affirmed.

The court of appeals was unmoved by the circumstances surrounding Damian's first two interrogations, concluding that a reasonable 14-year-old would have felt free to end his questioning and leave, and that Damian's statements were voluntary. It declined to resolve whether Damian was in *Miranda* custody for his third interrogation, holding that most of his statements were duplicative and thus that any error in their admission was harmless.

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

ISSUES PRESENTED

1. **Was Damian in *Miranda* custody during any of his three interrogations?**

The circuit court answered "no" across the board. The court of appeals answered "no" as to Damian's first two interrogations and declined to answer as to his third, invoking harmless error.

2. **Were any of Damian's interrogation statements involuntary?**

The circuit court again answered "no" across the board. The court of appeals again answered "no" as to Damian's first two interrogations. It did not address voluntariness as to his third round of statements.

3. **On appeal, the State requested an evidentiary hearing on harmlessness if the court of appeals deemed any of Damian's statements suppressible. In his reply, Damian acknowledged that two recent, published court of appeals decisions contradict each other on this issue: in *State v. Rejholec*, 2021 WI App 45, ¶35 n.14, 398 Wis. 2d 729, 963 N.W.2d 121, the court of appeals remanded for an evidentiary hearing, while in *State v. Abbott*, 2020 WI App 25, ¶¶49-50, 392 Wis. 2d 232, 944 N.W.2d 8, it assessed harmlessness based on the existing record. The question thus remains: is an evidentiary hearing on harmlessness necessary when a defendant seeks plea withdrawal based on the improper denial of a motion to suppress some, but not all, of the State's evidence?**

This issue was not presented to the circuit court. The court of appeals assessed harmlessness based on the existing record.

CRITERIA FOR REVIEW

The most obviously review-worthy issue presented is the third: whether an evidentiary hearing is required on the question of harmlessness when, following a guilty plea, a reviewing court suppresses a portion of the State's evidence. Published case law answers this question in conflicting ways, rendering this Court's involvement critical under Wis. Stat. § 809.62(1r)(d) and *Cook v. Cook*, 208 Wis. 2d 166, 188-89, 560 N.W.2d 246 (1997). The evidentiary hearing question is also a frequently recurring legal issue that warrants review under § 809.62(1r)(a) and (c)3.

But the first two issues presented also merit this Court's attention. Across the country, laws governing juvenile interrogations are evolving as judges and legislatures increasingly recognize that youth are "particularly susceptible to self-incrimination." Kate Bryan, Nat'l Conf. State Legislatures, *Recent State Laws Strengthen Rights of Juveniles During Interrogations* (Jan. 10, 2024), https://www. ncsl.org/state-legislatures-news/details/recent-state-laws-strengthen-rights-of-juveniles-during-interrogations. This evolution is rooted in a growing consensus that the law in this realm is often misaligned with developmental science; we now know that "the prefrontal cortex—the region of the brain responsible for reasoning, planning and considering long-term consequences—does not fully develop until age 25," leaving younger subjects at a distinct disadvantage in the interrogation room. *Id.*

In many jurisdictions (including Wisconsin), increased protections for youth subjected to police interrogation have begun to fill the gap between the constitutional principles that have historically governed and the reality that those principles were developed with adults in mind. *See, e.g., State v. Jerrell C.J.*, 2005 WI 105, ¶¶57-58, 283 Wis. 2d 145, 699 N.W.2d 110. But there is work to be done. To continue refining constitutional safeguards in light of children's special vulnerability in the interrogation room, Damian submits that

Wisconsin courts should prioritize publishing decisions that address the thorny but common—and critically important—issues juvenile interrogations so often pose. Damian's experience, in particular, offers this Court an opportunity to delve into a reasonable 14-year-old's perceptions about police questioning, the stationhouse, and his own authority to walk away; to address the role that long-term abuse can play in undermining a child's capacity to resist self-incrimination; and to harmonize the *Miranda* custody and voluntariness inquiries with both common sense and scientific consensus on adolescent brain development and childhood trauma. On these issues, there is no substitute for binding case-by-case analysis. We have almost none.

STATEMENT OF THE CASE AND FACTS

This petition relates to Damian's appeal of the denial of his motion to suppress statements made during three police interrogations. The key facts are those surrounding the interrogations. But since the law governing the admissibility of Damian's statements requires close attention to context, the following summary also covers Damian's upbringing, Ethan's death, and the litigation that followed.

I. Damian's childhood.

Damian lived with his biological parents from birth to about age six, when they divorced. (32:2). Damian, his little sister, and their mother Tina later moved in with Tim. (32:3). Around 2012, when Damian was a young elementary schooler, Tina married Tim. (32:3). Damian's biological father voluntarily terminated his parental rights, and Tim adopted Damian and his sister. (32:3).

When Damian first moved in with Tim, he stayed in touch with his biological father and paternal grandparents. (32:3). Damian and his sister would take weekend trips to visit them. (32:3). Later, Tim stopped allowing the visits, and the family became estranged. (32:3).

Tim brought other changes to the household, too. (32:6). As Damian put it, Tim was "a little strict." (32:6). If he or his sister talked back, Tim would put soap in their mouths. (32:6). Other punishments Tim inflicted included forcing his children to "stand outside in the ice and snow 'with no shoes on ...' for lengthy periods" (32:6); making them "carry wood for two or more hours ... [even in] ice and snow" (32:7); making them "stand in a corner" for hours (139:4); and having them "kneel on a paint tray on the concrete driveway." (139:4).

Damian said no one in the home reported the abuse they suffered. (32:7). Had they, he said, "we wouldn't have a house." (32:7).

After Damian had lived with Tim for several years, navigating his rules and punishments, the household grew: Tim began fostering two great-nephews and a great-niece. (139:6; Int. 2 at 5:56pm).[2]

Damian reported that "circumstances within the home became increasingly stressful" when these children moved in. (32:7). In Damian's view, they "did not readily learn or adapt to 'Tim's rules.'" (32:7). As a result, Tim ordered them "to carry wood on 20 occasions or more." (32:7). One of those occasions was in April 2018.

II. Ethan's death.

On April 20, 2018, when Damian was 14, he and his seven-year-old foster brothers were ordered to carry wood. (1:2). Damian had, according to Tim, failed to sufficiently memorize 13 Bible verses; the younger boys were in trouble for different infractions. (1:7).

Since Tim and Tina would be out of the house, Tim ordered Damian both to carry wood and to ensure that the younger children carried wood too. (1:2). For Ethan, Tim selected "a heavy wooden log, weighing approximately two-thirds his body weight." (1:2). Tim

[2] *See infra* n.2 (explaining this brief's citations to recordings).

directed the boys to haul their logs "for two hours around a predetermined path in a wet and snowy area" beside their home. (1:2).

Damian attempted to make Ethan finish this task, but Ethan struggled, and Damian's enforcement methods escalated. At various points, Damian hit, kicked, and poked Ethan. (1:2). Eventually, as Ethan lay on the ground, Damian and his siblings buried him in heavy snow; Damian believed making Ethan "really cold" would spur him to get up. (1:6).

After a while, Ethan stopped moving. (1:8). Damian "unburied" him, finding him "stiff, statue-like and unresponsive." (1:8). He then called Tim, reporting that Ethan was "acting like he's dead." (1:8-9). Tim and Tina returned home and took Ethan to the emergency room. (1:2). Damian came along, with Ethan draped across his lap in the backseat. (1:2).

At the hospital, Ethan remained unresponsive, "had an extremely low body temperature and had multiple bruises and injuries on his body." (1:2). He did not survive the night. (1:2) An autopsy showed that Ethan's "cause of death was hypothermia due to environmental cold exposure," and that Ethan's other "significant conditions" were "blunt force injuries." (1:3).

III. Damian's four interrogations.

While Ethan was being treated that evening, Damian was interrogated twice: first at the hospital, then at the sheriff's office. Around 2:45am on April 21st, several hours after Ethan was pronounced dead, Damian was woken up and interrogated a third time, again at the sheriff's office. Damian was interrogated a fourth time several months later, again at the sheriff's office, but this time with counsel present.

Details regarding these four interrogations are set forth below (though only the first three are at issue). They come from the testimo-

ny provided at Damian's four-day suppression hearing (*see* 94; 95; 100; 171; App. 32-60), and from the recordings the State submitted before the first day of the suppression hearing (*see* 87).[3]

A. First interrogation.

Lieutenant Dave Remiker questioned Damian at the hospital not long after the family arrived with Ethan in the early evening on April 20th. (1:6; 94:6). Remiker had already spoken with a detective about Ethan's condition and had learned who was present for the incident that caused it. (94:19-20). He believed "Damian probably had more information than anybody else." (94:19).

Remiker found Damian in the "family room" near the emergency room, where he and his mom were waiting for news about Ethan. (94:11). Remiker asked Damian if he would move to a separate room so they could talk privately, and Damian agreed. (94:12). "Damian was very cooperative" and "made no request to have anybody with him." (94:12).

The two went to a small room "right across the hall." (94:12, 14). Remiker either closed or "slightly closed" the door before questioning Damian. (94:23). He audio recorded their conversation. (94:12-13). He did not provide *Miranda* warnings. (94:21).

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[3] The first interrogation was audio recorded. It consists of one clip with no date- or timestamps. Citations to this recording reflect the relevant time within the recording. So, "Int. 1 at 4:08" means the statement at issue appears 4 minutes and 8 seconds into the recording of the first interrogation.

The others were video recorded. The recordings consist of multiple clips, each displaying the date and time throughout. Citations to these recordings reflect the time of day at which the relevant statement was made. So, "Int. 2 at 6:01pm" means the statement at issue was made at 6:01pm during the second interrogation.

According to Remiker, Damian was not "handcuffed or restrained," and Remiker did not arrest him. (94:13). Remiker was wearing street clothes but was "armed with a badge." (94:24).

The two spoke for 10 minutes. (94:12-14). While Damian's voice shook—his stress is apparent from the recording—he never asked "to stop talking." (94:14; *see also, e.g.,* Int. 1 at 1:00, 4:55). He answered Remiker's questions. He also expressed concern about doing so, saying, "I just hope I didn't make it any worse." (Int. 1 at 4:55).

While Damian was cooperative, Remiker pushed him when he claimed ignorance about Ethan's injuries. "You need to be honest with me," he prodded, "something happened out there." (Int. 1 at 0:05). Later, when Damian became distressed, Remiker offered false reassurance to encourage further disclosures: "It's okay, we're not getting anybody in trouble, obviously this was an accident, but I need to know specific details." (Int. 1 at 1:06).

Over the course of the interrogation, Damian confessed that he poked, pushed, swatted, and slapped Ethan in an effort to get him moving. (Int. 1 at 0:31, 1:16-32, 2:19, 2:56). When those efforts didn't work, Damian said he took Ethan's boots off and, along with his siblings, buried Ethan in a "coffin of snow." (Int 1 at 3:45, 3:57-4:10, 4:45).

Remiker expressed shock upon learning that the Hauschultz children had to carry wood for "two hours straight," and he followed up with an array of questions about what Damian meant by "carrying wood." (Int. 1 at 5:36-8:05). During this discussion, the recording stops. (Int. 1 at 8:05). Remiker later testified that he'd received a call and that the questioning ended there. (94:21).

B. Second interrogation.

Later that evening, a second law enforcement officer, Detective Christine Bessler, interrogated Damian at the sheriff's office. (94:47-

50). Beforehand, Bessler went to the hospital and asked Tim for permission. (94:50). Tim "gave verbal consent." (94:50). She then asked Damian whether he'd "be willing to sit down with" her, and Damian agreed. (94:50). When Bessler told Tim she'd be taking Damian to the sheriff's office, Tim did not object. (94:52).

Bessler drove Damian from the hospital to the stationhouse in an unmarked police car. (94:52). Bessler testified that she did not believe Damian could open his door once he was inside her car; back doors in police cars generally don't open from inside. (94:75).

They arrived at the sheriff's office about five minutes later. (94:53). Bessler brought Damian to an interview room with "couches, lighting, tables." (94:43). The room has recording equipment, which Bessler turned on. (94:54). It's also in a secure area: citizens cannot get in unescorted, nor are they free to leave without an escort. (94:71-72).

Questioning began shortly before 6:00pm. (Int. 2 at 5:49pm). Damian was not handcuffed or told he was under arrest. (94:60). Again he wasn't read his *Miranda* rights. (94:54-55). Bessler did, however, give Damian coffee and tell him he could ask questions or say "he no longer wanted to talk." (94:55). He drank the coffee. (94:55). He didn't say he no longer wanted to talk. (94:55).

Early in the interview, Bessler learned that Damian was a middle school student. (94:56-57). She thought he seemed smart. (94:57).

The two spent time clarifying the details of Damian's household—what the house and yard were like and how the members of the household were related. (Int. 2 at 5:50-6:10pm). Here and later on, Damian described how he and his sister helped supervise their foster siblings (by, for example, getting them on the school bus and enforcing their punishments). (Int. 2 at 6:15pm, 6:21pm, 6:23pm, 6:42pm, 6:52pm). Damian also described his foster siblings' behavioral problems, including "defiance" at school and at home. (Int. 2 at 6:05-08pm,

6:35-37pm). Damian expressed irritation with the way his life had changed since their arrival. (*See, e.g.*, Int. 2 at 6:19-20pm, 7:01pm).

Bessler's questions eventually moved to Ethan's injuries. (Int. 2 at 6:51pm). Damian again explained that, after Ethan stopped making progress, he and his siblings buried him in snow and left him there while they finished carrying wood. (Int. 2 at 7:02-03pm, 7:07pm). The "point was to get [Ethan] to give up on his 'I'm not moving thing,'" Damian explained, "but at that point we didn't know he was knocked out." (Int. 2 at 7:09pm).

Damian told Bessler that when he realized something was wrong, he called Tim. (Int. 2 at 7:10pm). He told Tim that Ethan was "playing possum." (Int. 2 at 7:12pm). When Tim and Tina got home, Damian said he got freaked out and went to sit outside on the porch with a "'what in the world have I done?' type feeling." (Int. 2 at 7:14pm). Had he known this would happen, Damian said, he would have helped Ethan. (Int. 2 at 7:22pm). At one point, Damian asked: "How can so many things go wrong in two hours?" (Int. 2 at 7:24pm).

While questioning continued, Tim showed up, asked to speak with Damian, and—after a brief conversation—took him away. (94:43-44, 58-60). It was about 8:15pm. Damian's second interrogation had lasted nearly two and a half hours.

C. Third interrogation.

Sometime after 10:00pm (not long after Ethan died), an investigator accompanied child protection social worker Laura Zimbler to the Hauschultz home. (94:37). Zimbler immediately noticed signs of problematic discipline, including a board listing the hours Ethan was required to carry wood. (94:44-45, 50).

Zimbler and the investigator asked Tim and Tina to bring the kids back to the sheriff's office right away. (94:39). They did. (94:39).

There, Damian and his siblings were put in a conference room. (94:62). Over the next several hours, Bessler and Zimbler pulled them out one-by-one and questioned them. (94:62). Damian went last; it was nearly 3:00am when he was woken up. (94:85-86).

The interrogation took place in the same room and was again recorded. (94:36, 65). Damian wasn't Mirandized and wasn't told he was free to leave. (95:26-27).

The substance of Damian's statements overlapped with those he'd made earlier, though he reluctantly offered additional incriminating details. Most notably, he admitted that he twice stepped on Ethan's back, snow boot on, to push him down for a "face wash." (Int. 3 at 3:31-33am). But despite the consistency of Damian's story, the questioning was more intense—as Bessler later acknowledged. (*See* 94:64, 81).

First, Damian told his interrogators that Tim had instructed him not to speak with police until he talked to a lawyer. (Int. 3 at 2:43am). Damian tried to follow Tim's advice, repeatedly saying he thought he should keep quiet. (Int. 3 at 2:46-49am). But he struggled, making inculpatory statements here and there and expressing confusion about whether he should say more. (*See* Int. 3 at 2:45-47am, 2:49am, 3:07-08am). The conflict Damian felt is evident throughout the recording. At one point, he verbalizes it, saying: "My brain is confusing itself with what it should do." (Int. 3 at 3:11am).

Second, the interrogators ratcheted up their tactics. A few minutes in, Zimbler screamed, "[Ethan] is dead! How did [Ethan] get dead?!" (Int. 3 at 2:47am). Bessler then accused Damian of not caring that Ethan died. (Int. 3 at 2:47am). A minute later, Zimbler challenged Damian: "You don't think people's lives are a big deal?" (Int. 3 at 2:48am). Bessler referenced her interviews with the other children, saying she had "good information" and just wanted to give Damian

a chance to explain. (Int. 3 at 3:03am). His silence, she said, would make him "take the fall" for Ethan's death. (Int. 3 at 2:46am).

Third, Damian's distress was more acute. He repeatedly cried. (*See, e.g.*, Int. 3 at 2:53am, 3:06am). He expressed sadness not just about Ethan's death, but also about how he'd treated Ethan behaved when Ethan was alive, lamenting, "I never accepted him." (Int. 3 at 2:57am). Damian said he feels angry all the time—a "burning inside." (Int. 3 at 2:52am, 2:58am). And he described experiencing, in that moment in the interrogation room, a combination of "anger, confusion, and feeling sorry." (Int. 3 at 3:11-13am). Finally, Damian articulated regret, telling Bessler: "We could have done something to prevent that from happening." (Int. 3 at 3:13am).

After over an hour of questioning, Damian's third interrogation ended. It was 3:45am.

Damian and his siblings remained at the sheriff's office until later that morning, when they were sent to emergency placements outside of Tim's care—and against his wishes. (94:65; 95:38-39, 48-49). Damian went to stay with an uncle. (95:48-49).

D. Fourth interrogation.

Damian's fourth and final interrogation took place months later, back at the sheriff's office, again with Bessler. (94:66). He had counsel this time. (94:66). The interview was in the same room and was recorded. (94:67). Damian was not Mirandized. (94:68).

His attorney, here, was Anthony Nehls. (100:3-4, 7-8). Nehls was appointed by the public defender's office to represent Damian "pre-charge." (100:7). Nehls spoke with the State about the charges Damian might face, and the State said it was considering a Class A homicide. (100:8). The State noted it would be willing to bring a Class B charge in exchange for another debrief. (100:9).

Nehls talked to Damian about avoiding a Class A homicide charge but did not inform him that it carried "a mandatory life sentence." (100:18). Nehls later testified that, before representing Damian, he had "[z]ero" experience with intentional homicide prosecutions. (100:15).

Damian agreed to speak with law enforcement again. (100:9-10). According to Nehls, Damian wasn't "excited" about it but wanted to follow counsel's advice. (100:13-14). For his part, Nehls had doubts about how much Damian had to gain from the debrief but ultimately decided "it was in [Damian's] interest." (100:19-20). Nehls conceded that he made that determination without discovery; his insight into the State's evidence came mostly from Damian's CHIPS file, which the CHIPS lawyer had passed along. (100:23).

Damian's original agreement with the State required only a debrief. (100:21). But at the last minute, the State added a condition: Damian also had to plead guilty to a Class B homicide charge. (100:20-21). If Damian went to trial, the State could bring the Class A charge despite his cooperation. (100:20-21).

Nehls said it made him "a little uncomfortable" that the State added this condition "right before the interview." (100:21-22). He conveyed the change to Damian on the spot, telling him he could avert a Class A homicide charge only by giving the police another statement, with no accompanying offer of immunity, *and* pleading guilty to a Class B homicide. (100:23, 32). Damian "still went forward." (100:23).

Nehls acknowledged that his agreement with the State was merely verbal; the State never reduced its promise, or the conditions thereof, to writing. (100:28).

Once inside the interview room, Bessler asked Damian for a general update and for details about the Bible verses Damian had been required to memorize back in April. (Int. 4 at 2:18pm, 2:43pm). Later, Bessler asked about the frustration Damian had expressed about his foster siblings; Damian explained that they'd aggravated him because they acted "like kids their age." (Int. 4 at 2:34pm).

As the interrogation continued, Bessler asked about other aspects of Damian's family, including his renewed relationship with his biological father and paternal grandparents. (Int. 4 at 2:36-40pm). And she elicited more details about the strain on Damian's family—and Damian himself—following the foster kids' arrival. (Int. 4 at 2:40-43pm). Finally, over half an hour in, they began discussing Ethan's death. Damian reported that his foster sister (Ethan's biological sister) had also hit Ethan, kicked Ethan, and stood on Ethan's head the day he died. (Int. 4 at 2:54-56pm).

Towards the end of the conversation, Nehls prodded Damian to tell Bessler that, while en route to the hospital on April 20th, Tim told Damian not to say anything that would get anyone else in trouble. (Int. 4 at 3:05-09pm). Damian confirmed that Tim said that. (Int. 4 at 3:05-09pm).

Nehls was present throughout. (100:10-11). He considered the interrogation "cordial." (100:12). When it ended, he and Damian left the sheriff's office together. (100:11-12).

IV. Damian's juvenile and criminal cases.

Well before Bessler conducted Damian's final interrogation, Damian was adjudicated delinquent in connection with Ethan's death. (32:4). The juvenile court imposed supervision, which Damian successfully completed. (32:4; 139:6). Social worker Rodney Zahn later testified about Damian's performance on supervision, saying he did very well building anger management skills, "was amenable to treatment, had no drug use, and [had] no new referrals or conflicts." (58:2, 4). Zahn believed Damian was at a low risk to reoffend. (58:4).

After Damian was discharged from supervision, the State filed a criminal complaint, again in connection with Ethan's death. (*See* 1). It charged Damian with several felonies, including the Class B homicide promised to Nehls. (1:1). Damian was just 15 years old. (*See* 1:1).

Damian requested a reverse waiver hearing. (*See* 16). Dr. Deborah Collins, who the circuit court found "has impressive credentials" and "varied experience and training," conducted a mental health evaluation in advance of that hearing. (58:3; *see also* 32:1). Collins and her associate met with Damian repeatedly, interviewing him and administering tests. (32:1). Collins also reviewed Damian's school records, the complaint, and an old child abuse complaint against Tim. (32:2). Finally, she interviewed Damian's paternal grandparents, with whom Damian had reconnected. (32:2, 7-8).

Collins offered her conclusions about Damian's mental health and treatment needs in a report. (32:8-10). She concluded, first, that "Damian's insight into his underlying mental health ... [and] developmental problems … is marginal," as "his awareness of his trauma history is in its infancy at best." (32:8-9). While Damian was forthcoming, he did not "voluntarily identify the abusive circumstances he [faced] as abusive," instead presenting them as "commonplace within the home and as if to be expected by children." (32:7).

Still, Collins opined, "[n]either Damian's pattern of living outside of the circumstances which … brought him before the court, [nor the] collateral information" she had reviewed, nor the "psychometric data" she had gathered "support a conclusion that Damian is an antisocial, characteristically violent or acting out adolescent." (32:9). Rather, she explained, "Damian is a youth capable of and inclined to experience prosocial emotions." (32:9).

To address the adversity in Damian's childhood and his resulting psychosocial needs, Collins recommended trauma-informed therapy, developmentally appropriate training in social skills and anger management, continued formal education, and support in establishing "positive peer and adult influences." (32:9). These treatment recommendations and "clinical considerations," Collins noted, "weigh in favor of [transferring Damian] ... to juvenile court." (32:10).

After a two-day reverse waiver hearing, the circuit court held the case "undeniably serious" with "few mitigating circumstances." (58:9). It wasn't persuaded by Collins's opinions or Zahn's discussion of Damian's supervision success and the harm incarceration would cause him. (*See* 58:2-8). It retained jurisdiction. (58:12).

Damian next filed a suppression motion. (61). There were multiple hearings on it—three at which witnesses testified (94; 95; 100), and one oral ruling (171; App. 32-60). The issues presented were

whether Damian should have received *Miranda* warnings at any point and whether Damian confessed involuntarily. (171:5; App. 36).

The circuit court held that Damian was never in custody, so *Miranda* warnings weren't required. (171:25; App. 56). It further held that the State proved his statements voluntary. (171:25; App. 56). It denied suppression. (111; App. 31).

The parties later reached a deal. Damian pleaded guilty to first-degree reckless homicide; the less serious charges were dismissed but read in. (172:6). The State recommended a term of initial confinement between 12 and 17 years, and defense counsel recommended eight to 10 years' confinement followed by 10 to 12 years' supervision. (169:10, 34; 172:6).

The circuit court went further than either party suggested. When Damian was just 17 years old, it imposed 20 years' confinement and 10 years' supervision. (169:47).

Damian appealed the denial of his suppression motion as to his first three interrogations. He argued that he was entitled to *Miranda* warnings and involuntarily confessed.

The court of appeals affirmed. *State v. Hauschultz*, unpublished slip op., No. 2022AP161-CR (Ct. App. March 13, 2024) (per curiam) (App. 3-30). It held that Damian wasn't in *Miranda* custody during his first two interrogations and declined to decide the issue as to his third, invoking harmless error. *Id.*, ¶3 (App. 4-5). It held that Damian's statements were voluntary during his first two interrogations and didn't address the issue as to his third. *Id.*, ¶2 (App. 4).

ARGUMENT

I. This Court should grant review to decide whether Damian was in *Miranda* custody during any of the interrogations at issue.

A. Introduction.

Whether law enforcement's failure to provide *Miranda* warnings renders Damian's interrogation statements inadmissible turns on whether he was in custody—i.e., whether an ordinary person in Damian's shoes would *not* have felt free to end his questioning and leave. *See J.D.B. v. North Carolina*, 564 U.S. 261, 270 (2011); *Thompson v. Keohane*, 516 U.S. 99, 112 (1995). All the objective facts surrounding the interrogations are relevant. *J.D.B.*, 564 U.S. at 264. No single fact has "talismanic power." *Howes v. Fields*, 565 U.S. 499, 509 (2012).

But Damian's age may be the most critical consideration: "It is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances will feel free to leave." *Id.* at 270. This Court will also consider the acute stressors permeating all three interrogations, the police-dominated atmosphere in which the second and third took place, the fact that Damian was alone with his interrogators, their failure to say he could ask for a parent or lawyer, and the psychological pressures they imposed on him.

Importantly, *Miranda*'s chief concern wasn't "overt physical coercion or patent psychological ploys." *Miranda*, 384 U.S. at 457. Rather, it cautioned against the "compelling pressures" inherent in "incommunicado interrogation ... in a police-dominated atmosphere" (what Damian experienced), and later cases have urged extra caution with minors (like Damian). *See id.* at 445, 467.

The interrogations here present certain trademark compelling pressures. They lack others. But each was conducted with 14-year-old Damian, who'd endured years of abuse in Tim's care, had suffered

recent trauma, and had no friendly adult by his side. While the court of appeals played lip service to the relevance of Damian's age, neither lower court meaningfully grappled with the profound imbalance of knowledge and power inherent in law enforcement's interrogation of an eighth grader.

This Court's in-depth analysis of the factors at play during Damian's interrogations—with special attention to both common-sense and scientific understandings of the special role *youth* plays—is warranted.

B. Applicable law.

The Fifth Amendment to the United States Constitution guarantees that "[n]o person … shall be compelled in any criminal case to be a witness against himself." *Miranda* held that certain procedural safeguards—known as *Miranda* warnings—are required to protect this right against the threat posed by custodial interrogation. *Miranda*, 384 U.S. at 478-79.

The significance of *Miranda* warnings has been reiterated in case after case for over half a century. In *J.D.B.*, for example, the United States Supreme Court explained that "[e]ven for an adult, the physical and psychological isolation of custodial interrogation can 'undermine the individual's will to resist and … compel him to speak where he would not otherwise do so freely.'" 564 U.S. at 269. Indeed, the pressure is so acute that "a frighteningly high percentage of people" subjected to custodial interrogation "confess to crimes they never committed." *Id.* (quoting Drizin & Leo, *The Problem of False Confessions in the Post-DNA World*, 82. N.C. L. Rev. 891, 906-07 (2004)). False confessions are especially common among youth, as they are more "susceptible to … outside pressures" than adults, are generally less mature and responsible, and lack the "experience, perspective, and judgment" necessary "to recognize and avoid choices that could be detrimental to them." *Id.* (internal quotations and citations omitted).

Even when the "inherently compelling pressures" of custodial interrogation do not elicit a false confession, they may wear away at a subject's defenses, thereby coercing inculpatory—if truthful—statements. *Miranda*, 384 U.S. at 467. This, too, *Miranda* deemed intolerable. An interrogation subject is entitled to "a full opportunity to exercise the privilege against self-incrimination," whether his statements are true or not. *See id*.

Miranda warnings proactively mitigate the risks custodial interrogation poses to the privilege. *Id.* But while they're prophylactic, they're also constitutionally required. *Dickerson v. United States*, 530 U.S. 428, 432 (2000). As a result, when police fail to give *Miranda* warnings before a custodial interrogation, the subject's statements cannot "be used against him." *Miranda*, 384 U.S. at 479.

It is undisputed that law enforcement never Mirandized Damian. The issue is whether Damian was in custody such that warnings were required.

Whether an interrogation was custodial for *Miranda* purposes "is an objective inquiry." *J.D.B.*, 564 U.S. at 270. A reviewing court must first ascertain what "the circumstances surrounding the interrogation" were, and must then assess whether, under those circumstances, "a reasonable person [would] have felt he or she was at liberty to terminate the interrogation and leave." *Id.* Any objective fact bearing on "how a reasonable person … would perceive his or her freedom to leave" is relevant. *Id.* at 270-71. The subjective views of those involved are not. *Id.* at 271.

The objectivity of the custody test is critical to its workability: it "avoids burdening police with the task of anticipating the idiosyncrasies of every individual suspect and divining how those particular traits affect each person's subjective state of mind." *Id.* But workable doesn't mean easy. In determining whether a reasonable person in an interrogation subject's position would feel free to end an interview,

police must consider the full range of surrounding circumstances, including:

- the subject's age (*id.* at 272);
- whether the interrogation took place in a police-dominated environment, like a stationhouse (*Miranda*, 384 U.S. at 456);
- whether the subject was moved from one location to another for questioning (*State v. Bartelt*, 2018 WI 16, ¶32, 379 Wis. 2d 588, 906 N.W.2d 684);
- whether the subject was isolated—i.e., alone with law enforcement—during the interrogation (*Miranda*, 384 U.S. at 449-450);
- how long the interrogation lasted (*State v. Dobbs*, 2020 WI 64, ¶63, 392 Wis. 2d 505, 945 NW.2d 609);
- what statements the subject made during the interrogation (*State v. Halverson*, 2021 WI 7, ¶30, 395 Wis. 2d 385, 953 N.W.2d 847);
- whether the subject was physically restrained, and if so, what degree of restraint was employed (*id.*);
- whether the subject was released after the interrogation ended (*id.*); and
- whether the interrogator used coercive tactics, like showing confidence in the subject's guilt; exhibiting "[p]atience and persistence" when confronted with reluctance to talk; engaging in lengthy questioning; or working to "persuade, trick, or cajole" the subject into speaking. (*Miranda*, 384 U.S. at 455-56).

This Court will consider these factors—as part of the totality of the objective circumstances—in two steps. *See Bartelt*, 379 Wis. 2d 588, ¶25. It will start by upholding the circuit court's findings of fact unless clearly erroneous. *Id.* It will then independently determine the legal question of whether those "findings support a determination of custody." *Id.*

C. Review is warranted on the question of whether Damian was in *Miranda* custody.

Damian faced the exact coercive pressures *Miranda* warnings were designed to address: isolation in a police-dominated or otherwise intimidating and constraining atmosphere paired with the pressures of psychologically coercive questioning about criminal conduct.[4] What's more, Damian was just an eighth-grade boy.

An ordinary 14-year-old is not accustomed to exerting control "over [his] own environment." *See State v. Jerrell C.J.*, 2005 WI 105, ¶128, 283 Wis. 2d 145, 699 N.W.2d 110 (Butler, J., concurring) (citing *Roper v. Simmons*, 543 U.S. 551, 569 (2005)). An ordinary 14-year-old largely does what the adults in his life tell him to do: submission is expected, and it's enforced with the threat of consequences. And an ordinary 14-year-old "lack[s] the freedom that adults have to extricate themselves from a criminogenic setting." *Id.* Given these commonsense conclusions about adolescents' perceptions, behavior, and capacities, the United States Supreme Court has recognized that, when it comes to police interrogations, "events that 'would leave a [grown] man cold and unimpressed can overawe and overwhelm a

[4] Given the word limit, this petition does not delve into the coercive questioning methods police used against Damian. His appellant's brief does. *See* App. Br. 40-42. Likewise, while Damian's second and third interrogations were at the stationhouse (the definition of a police-dominated atmosphere), this petition does not delve into the coercive aspects of the hospital environment in which Damian's first interrogation took place. Again, his appellant's brief does. *See id.* at 34.

lad in his early teens.'" *J.D.B.*, 564 U.S. at 272 (quoting *Haley v. Ohio*, 332 U.S. 596, 599 (1948)). If Damian's youth is insufficient to render the (sometimes extreme) conditions he faced custodial, what role does age in fact play in the analysis?

Binding guidance remains necessary to demonstrate the constitutional significance of an interrogation subject's youth. The disconnect between what common sense and developmental science teach about children's perceptions of police questioning, on the one hand, and how lower courts are analyzing *Miranda* custody, on the other, is too vast for this Court to ignore.

II. This Court should grant review to determine whether the circumstances surrounding Damian's interrogations show "the pressures brought to bear" exceeded his "ability to resist," rendering his statements involuntary.

A. Introduction.

"[A] 14-year-old boy, no matter how sophisticated," is far from "equal to the police in knowledge and understanding of the consequences of the questions" he's answering, and "is unable to know how to … get the benefits of his constitutional rights." *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962). The special disadvantage of youth in the interrogation room led the United States Supreme Court to declare that reviewing courts must employ "the greatest care … to assure that" a child's uncounseled statement "was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or adolescent fantasy, fright or despair." *In re Gault*, 387 U.S. 1, 55 (1967).

It is difficult to square that constitutionally mandated care with the court of appeals' confidence that Damian's statements were voluntary. Significant aspects of the record show Damian's self-incrimination was not based on "deliberateness of choice," but immaturity,

ignorance, and susceptibility to pressure from law enforcement. *See State v. Hoppe*, 2003 WI 43, ¶36, 261 Wis. 2d 294, 661 N.W.2d 407. Most importantly, Damian's youth and trauma background show he was at a nearly insurmountable disadvantage when confronted with police questioning. This Court should grant review to clarify the role those considerations play in the voluntariness inquiry—and to demonstrate to lower courts what *Gault*'s "greatest care" dictate means in practice. *See Gault*, 387 U.S. at 55.

B. Applicable law.

Due process precludes the State from using a defendant's involuntary confession in prosecuting him. *Moore*, 363 Wis. 2d 376, ¶55. A confession is voluntary, and thus admissible, if it is "the product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the State exceeded the defendant's ability to resist." *Hoppe*, 261 Wis. 2d 294, ¶36 (quotations omitted).

The State carries the burden of proving a confession voluntary by a preponderance of the evidence. *Id.* In assessing whether the State met that burden, this Court will evaluate Damian's statements "in light of all the circumstances surrounding [his] interrogation[s]," weighing his "personal characteristics against the actions of" his interrogators. *Id.*, ¶56.

The personal characteristics most relevant to the voluntariness inquiry include the subject's "age, education and intelligence, physical and emotional condition, and prior experience with law enforcement." *Hoppe*, 261 Wis. 2d 294, ¶39. These characteristics "are balanced against the police pressures and tactics which were used to induce the statements," including the place and length of questioning, "any excessive ... pressure brought to bear," "any inducements ... or strategies used by the police," and "whether the

defendant was informed of the right to counsel and right against self-incrimination" at the outset. *Id.*

While some evidence of "coercive or improper police conduct" is required to support "a finding of involuntariness," police conduct need "not be egregious or outrageous in order to be coercive." *Id.*, ¶19. If a subject's "condition renders him … uncommonly susceptible to police pressures," then "subtle pressures" may "exceed [his] ability to resist" and compel a finding of involuntariness. *Id.*, ¶¶33, 43, 46.

The totality-of-the-circumstances test applies whether the speaker is a child or an adult. *See id.*, ¶33. But reviewing courts must "exercise special caution when assessing the voluntariness of a juvenile confession, particularly when there is prolonged or repeated questioning or when the interrogation occurs in the absence of a parent, lawyer, or other friendly adult." *Jerrell C.J.*, 283 Wis. 2d 145, ¶21 (internal quotations omitted).

This Court will apply the principles governing voluntariness—including the extra caution case law requires here—in two steps. It will first "defer to the circuit court's findings regarding the factual circumstances" surrounding Damian's interrogations unless those findings are clearly erroneous. *Id.*, ¶16. It will then independently apply "constitutional principles to those facts." *Id.*

C. Review is warranted on the question of whether Damian's interrogation statements were involuntary.

Damian's personal characteristics put him at a unique disadvantage in the interrogation room.[5] His youth, his acclimation to abuse from adults, his resulting instinct to comply with adults' requests, and his lack of experience with police are just some of the traits

[5] *See* App. Br. 47-50 (this discussion, too, is excluded from this petition due to the word limit).

that heightened his risk of confessing involuntarily. Balanced against those traits are police tactics that, while rarely egregious, involved isolating Damian from his mom and other friendly adults, subjecting him to protracted stationhouse interrogations (including a round at 3:00am), failing to give *Miranda* warnings, and using deceptive interviewing techniques that guilted Damian and suggested that confessing would minimize the consequences he'd face.[6]

Even if Damian were an ordinary teenage boy, the coercion he endured may have produced an involuntary confession. But given the physical and psychological violence in Damian's daily life, he was no ordinary teenage boy; he was far more vulnerable to knee-jerk compliance with adult demands. The statements he made in response to police interrogation thus stemmed from "a conspicuously unequal confrontation in which the pressures brought to bear ... exceeded [his] ability to resist." *Hoppe*, 261 Wis. 2d 294, ¶36. As with the custody analysis, the lower courts' decisions render it unclear what role Damian's youth in fact plays in the analysis—and on the voluntariness question, the same is true for his history of trauma.

While the presence of so many compelling pressures is notable here, as are the many vulnerabilities Damian brought with him, there is nothing unique about youth, childhood trauma, or the combination of the two—even in the interrogation room. *See generally* Nat'l Child Traumatic Stress Network, *Assessing Exposure to Psychological Trauma and Posttraumatic Stress Symptoms in the Juvenile Justice Population*, at 1-2 (2023), https://www.nctsn.org/sites/default/files/resources/fact-sheet/assessing-exposure-to-psychological-trauma-and-posttraumatic-stress-symptoms-in-the-juvenile-justice-population.pdf. On the contrary, "[t]rauma exposure and its negative consequences are significantly more prevalent among justice-involved youth" than youth

[6] *See* App. Br. 50-53 (once again, this discussion is excluded from this petition due to the word limit).

"in the larger community." *Id.* at 1. A traumatized child in an interrogation room may lack the capacity to think through his options or intelligently choose among them—particularly when he has no insight into his trauma and no temporal separation from it.[7] He may lack the capacity to understand his rights or assert them, even if he's told what they are—which, of course, Damian wasn't.

This Court should grant review to clarify the analytical role both childhood trauma and childhood itself should play in a reviewing court's voluntariness assessment. And it should, at the very least, underscore that the hurdles the State must overcome to prove a confession voluntary are higher when a traumatized child is its source.

III. This Court should grant review to decide whether an evidentiary hearing on harmlessness is necessary when, following a guilty plea, a reviewing court reverses an order suppressing some—but not all—of the State's evidence.

The decision whether to plead or go to trial is reserved entirely for the defendant. *McCoy v. Louisiana*, 584 U.S. 414, 422 (2018). A defendant may make the choice based "on his prospects of success" at trial or for more idiosyncratic reasons. *Lee v. United States*, 582 U.W. 357, 365-68 (2017). In many plea withdrawal contexts, an evidentiary hearing is the mechanism that enables a reviewing court to determine whether a defendant's decision to plead guilty stemmed, at least in part, from a constitutional violation or other error—and whether the defendant might otherwise have taken his case to a jury. *Id.* at 369-71.

As *Abbott* explains, reviewing courts haven't historically required an evidentiary hearing when the error interfering with a defendant's decision to plead guilty was the denial of a suppression

[7] *See supra* p. 19 (discussing Dr. Collins's determination that, well after CPS removed Damian from Tim's care, Damian still didn't recognize the abuse he'd suffered).

motion. 392 Wis. 2d 232, ¶38. Instead of determining whether the failure to suppress evidence played into the defendant's idiosyncratic plea-or-trial decision, reviewing courts have assessed the existing record to determine whether the error was harmless. *Id.* But there are four key problems with this approach.

First, a published court of appeals decision released a year after *Abbott* didn't take it: instead, in *Rejholec*, the court of appeals remanded the matter for the circuit court to decide whether its erroneous suppression of evidence was harmless. 398 Wis. 2d 729, ¶35 n.14. There is now conflicting authority on whether, in this realm, harmlessness can be determined based on the existing record.

Second, the *Rejholec* approach—not the one taken by *Abbott* and earlier cases—aligns with case law's broader recognition that the strength of the State's case may not be the driving factor in a defendant's plea-or-trial decision. *See Lee*, 582 U.S. at 365-68. To give just one example, a defendant may be disinclined to go to trial if the jury will see evidence he finds especially embarrassing. Even if the State's case remains overwhelming absent the especially embarrassing evidence, that defendant may opt for a trial given its suppression—which he has a constitutional right to do. The bottom line is that the decision is a personal one. So how can a reviewing court determine—without permitting the parties to present evidence on the matter—whether a defendant would have pleaded guilty absent the suppression error?

Third, the harmless-error test remains confused in this domain. Traditionally, the question is whether the State has proven "beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *State v. Thomas*, 2023 WI 9, ¶49, 405 Wis. 2d 654, 985 N.W.2d 87 (internal quotation marks omitted). But per *Lee*, when the validity of a plea is at issue, it's not the decision of a hypothetical reasonable jury that matters: it's the decision the defendant himself would have made, reasonable or not. 582 U.S. at 366-68.

What's more, while some cases suggest the tests are equivalent, the reality is that precedent formulates the harmless-error inquiry in conflicting ways, deepening the ambiguity regarding the State's burden of proof. Is the question whether the State has proven there's "a reasonable possibility" the error contributed to Damian's decision to plead, or is it whether the State has proven beyond a reasonable doubt that the error made no difference? As the court of appeals suggested in *Abbott*, "these standards are inconsistent and should be clarified by our supreme court." 392 Wis. 2d 232, ¶47.

Fourth and finally, the court of appeals made its harmlessness assessment in this case based on a whole different formulation of the test. It asked whether the State had proven that properly suppressing Damian's third round of interrogation statements "would have changed his decision to plead guilty." *Hauschultz*, No. 2022AP161-CR, ¶75 (App. 29). Presumably the court of appeals misspoke and meant the opposite—that the State's burden was to prove suppression *wouldn't* have changed Damian's decision. But its confusion is a symptom of a broader problem. This is the Court that can bring clarity to a fundamentally important—but hopelessly muddled—inquiry in criminal appeals. Damian submits that it's time.

CONCLUSION

For these reasons, Damian asks this Court to grant review.

Dated this 12th day of April, 2024.

Respectfully submitted,

Electronically signed by Megan Sanders

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this petition conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of this petition is 7,999 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this petition is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 12th day of April, 2024.

Signed:

Electronically signed by Megan Sanders

Megan Sanders, SBN 1097296